IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. **DENNIS J. LOVATO.** Defendant.	)))))))))	No. 11-CR-1213-MCA

MOTION *IN LIMINE* TO EXCLUDE DEFENDANT'S SELF-SERVING DECLARATIONS AS INADMISSIBLE HEARSAY

The United States of America hereby moves for an order *in limine* prohibiting the Defendant, Dennis J. Lovato, either through direct examination or cross-examination, from eliciting testimony or introducing evidence of the Defendant's self-serving, out-of-court declarations as inadmissible hearsay under Rules 801 and 802 of the Federal Rules of Evidence. The United States further requests that the Court require the Defendant to obtain an admissibility ruling, outside the presence of the jury, prior to attempting to introduce any of his out-of-court statements. The United States submits that this motion is amenable to pretrial determination under Federal Rule of Criminal Procedure 12(b)(2) and one that should be determined prior to trial under Rule 12(d). In support of this motion, the United States sets forth the following:

BACKGROUND

On April 15, 2011, the Defendant was arrested and eventually charged with second degree murder. In association with the Defendant's arrest, he made several self-serving statements to law enforcement officials and others in attempt to minimize his culpability. The United States anticipates that the Defendant may seek to introduce his out-of-court statements to law enforcement and others as exculpatory statements. The Defendant may attempt to do so in an effort to put forth his defense without testifying or subjecting himself to cross examination, or, if the Defendant elects to take the stand, to impermissibly corroborate and bolster his own testimony.

ARGUMENT

The Defendant should not be permitted to introduce at trial his own prior, self-serving out-of-court statements because they are inadmissible hearsay pursuant to Federal Rules of Evidence 801 and 802 and do not fit within any of the exceptions contained within Federal Rules of Evidence 803 or 804. Furthermore, should the United States admit any portion of the Defendant's prior recorded statement, it will not do so in a way that implicates the rule of completeness.

A. The Defendant's Self-Serving, Out-of-Court Statements Are Inadmissible Hearsay

The Court should preclude the Defendant from introducing his own prior, self-serving out-of-court statements for the truth of the matter asserted because they are inadmissible hearsay pursuant to Rules 801 and 802 of the Federal Rules of Evidence. Hearsay is defined in Rule 801 as an out-of-court statement offered to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). Rule 802 provides that hearsay is not admissible except as provided by federal statute, the Rules of Evidence, or other rules prescribed by the Supreme Court. Fed. R. Evid. 802. It has long been established that self-serving, out-of-court statements made by a defendant are inadmissible hearsay when offered by the defense. *See United States v. Larsen*, 175 F. App'x 236, 241 (10th Cir. 2006) ("[The defendant] does not point to any exception to the hearsay rule that would permit him to introduce into evidence his own out-of-court exculpatory statements; nor can we identify one."); *Sedam v. United States*, 116 F.2d 80, 82 (10th Cir. 1940) (noting that a statement authored by the defendant, which supported his theory defense, "was a self-serving declaration, and was, therefore, inadmissible"); *see also United States v. Kirovski*, No. CR 08-367 MCA, slip op. at 16 (D.N.M. Jan. 9, 2009) ("The Defendant is hardly a disinterested witness whose trustworthiness would be self-evident under circumstances where only self-serving, out-of-court statements are offered. To allow him to circumvent the usual requirements of sworn testimony subject to cross-examination by selectively introducing his unsworn, self-serving out-of-court statements through the testimony of a government witness would be directly contrary to the general purposes of the hearsay rules and would not serve the interest of justice under these circumstances.")

While the United States may offer the statement of a defendant into evidence as a non-hearsay admission of an opposing party, the same is not true for a defendant. Fed. R. Evid. 801(d)(2). Rather, when a defendant seeks to introduce his own prior, self-serving out-of-court statement for the truth of the matter asserted, it is hearsay and not admissible. *See Larsen*, 175 F. App'x at 241 ("Rule 801(d)(2), which excludes from the definition of hearsay admissions by a party-opponent, does not apply because that rule does not permit self-serving, exculpatory statements made by a party and offered by that same party."); *see also United States v. Michael*, No. CR 06-1833 MCA, slip op. at 13 (D.N.M. Nov. 15, 2007) (noting that Rule 801(d)(2) "does not apply to a party's attempt to elicit *his own* out-of-court statements through another witness, at least when the statements are offered for the truth of the matter asserted") .

Furthermore, the Defendant's self-serving, out-of-court statements do not fit within any of the other hearsay exceptions recognized in Rules 803 and 804. Generally, self-serving statements offered by a defendant are not admissible under any of the hearsay exceptions because such statements lack "the required indicia of trustworthiness and reliability which support the admission of hearsay under exceptions to the hearsay rule." *United States v.*

Woosley, 761 F.2d 445, 449 (8th Cir. 1985). Should the Defendant contend, nonetheless, that his self-serving statements fit within a hearsay exception, the United States requests that the Court order the Defendant to obtain an admissibility ruling, outside the presence of the jury, prior to attempting to elicit testimony or otherwise introduce into evidence his own self-serving statements.

B. The Rule of Completeness Only Applies to Misleading Evidence

If the United States offers a portion of the Defendant's prior recorded statement, this does not open the door to the introduction by the Defendant of all of his prior, self-serving statements. Federal Rule of Evidence 106 states "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." Fed. R. Evid. 106. The purpose of the rule is to prevent litigants from misleading a jury by only offering a redacted portion of a document or recording. But the rule of completeness only requires admission of omitted materials if those materials are relevant and necessary to "clarify or explain the portion [of a statement] already received." *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (internal citations and quotations omitted). Thus, "it is not required that portions of a [statement] which are neither explanatory of the previously introduced portions nor relevant to the introduced portions be admitted." *United States v. Wright*, 826 F.2d 938, 946 (10th Cir. 1987). The Tenth Circuit has made clear that Rule 106 is not to be applied lightly, noting that "[i]t would be puerile to suggest that if any part of a statement is be admitted the entire statement must be admitted." *Id.*

The United States has no intention of offering evidence of Defendant's out-of-court, recorded statement in an intentionally misleading or confusing manner. Should the Defendant, however, seek to admit portions of his prior recorded statement pursuant to Rule 106, the United States requests that the Court order the Defendant to obtain an admissibility ruling, outside the presence of the jury, prior to attempting to do so.

CONCLUSION

For the reasons set forth above, the United States requests that the Court issue pretrial an order prohibiting the Defendant, either through direct examination or cross-examination, from eliciting testimony or introducing evidence of his self-serving, out-of-court declarations for the truth of the matter asserted. The United States further requests that the Court order the Defendant to seek an admissibility ruling, outside the presence of the jury, prior to attempting to admit any of his out-of-court statements.

Respectfully Submitted,
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I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to defense counsel and probation.

Filed Electronically 8/1/2013
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